the pleadings in the third party proceedings had closed. As the issue in those pleadings was as to who should pay the plaintiff the $684 should he be held to be entitled to that sum it follows that the third party being held liable, they must pay to the owners the costs occasioned by the third party proceedings. These costs will not include such costs as were incurred in the plaintiff's suit.

It has become unnecessary to decide whether the plaintiff a Eurasian British subject, is an Asiatic seaman within the meaning of S. 53 ss. 1 of the Merchant Shipping Ordinance or whether if the section does not apply, the agreement should have been in accordance with S. 43.

The form of agreement was not selected by the plaintiff. In any case the agreement conforms in substance with the agreement required by S. 43. That section does not forbid the insertion of rates and the insertion of the rate (assuming it to be unnecessary) does not render the agreement invalid or any less a written contract.

The plaintiff sues in *forma pauperis* and I make no order as to costs in the proceedings to which he is a party.

Claim allowed.

[APPELLATE CIVIL JURISDICTION]

TERRELL, Ag. C.J. (S.S.), POYSER, C.J. (F.M.S.) & GORDON-SMITH, Ag. J.A.

June 27, 1940.

ABDUL WAHAB BIN ABDUL RAUF & ANOR.
v.
HAJI WAHAB BIN HAJI MOHAMED & ANOR.

[MALACCA APPEAL No. 5 of 1940]

Malacca Customary Rights Ordinance (Cap. 125) —S. 111.

Malacca customary land is not capable of devise by will and the land descends on the death of the holder to the holder's heirs according to Mohamedan law. Any attempt to devise such land by will is nugatory.

APPEAL.

J. C. Cobbett and H. A. R. Paulusz for appellants (defendants).

Roland Braddell and S. C. Goho for respondents (plaintiffs).

The facts and arguments sufficiently appear from the judgment.

Cur. Adv. Vult.

Terrell, Ag. C.J.—One Haji Maimunah binte Haji Abdul Wahab died on the 19th day of February, 1921, leaving a will dated the 21st January, 1921. She appointed Inche Mohamed to be her executor, and he proved the will on the 27th October, 1921. Inche Mohamed died on the 24th March, 1938, and the first defendant is executor of his will. The first defendant is accordingly derivative executor of Haji Maimunah's will. As executor of Inche Mohamed's will he would be responsible for breaches of trusts and devastavits committed by Inche Mohamed as executor of Haji Maimuah's will, but only in so far as he had in his hands assets of Inche Mohamed's estate. The formal order does not make this clear, and the first defendant is ordered to account on the footing of wilful default as if he were the defaulting executor. The costs, however, were ordered to be paid out of the estate of Inche Mohamed and not by the first defendant personally.

Under the will of Haji Maimunah a certain house at Klebang Ketchil, Malacca, and the land on which it was built, were specifically devised to the plaintiffs who were her grandsons, being the sons of Maimunah's son Raof. The residuary legatees were the sons of the testatrix, Raof and Haji Ahmad. Raof held the testatrix's power of attorney prior to her death, and the land at Klebang was registered in his name. It was customary land within the meaning of the Malacca Customary Rights Ordinance (Cap. 125). It appears that Raof taking advantage of the situation fraudulently borrowed $10,000 on the security of the land from K.V.A.L. Valliappa Chetty prior to Maimunah's death.

On April 22nd, 1921, before Inche Mohamed had obtained probate, Raof wrote to him acknowledging that the land, though in his name, was the property of Maimunah, and that he had charged the land with $10,000—which he had borrowed from K.V.A.L. Valliappa Chetty. He authorised Inche Mohamed to pay the charge on the Klebang property and debit his share in the estate. Unfortunately the executor never had enough money attributable to Raof's share to repay the $10,000, and on the 29th December, 1922 Raof by arrangement with his equitable mortgagee, transferred the land to one Somasundaram Chetty for $10,700. This was apparently sufficient to satisfy K.V.A.L. Valliappa Chetty's debt, but the specific devise in favour of the plaintiffs became of no effect.

The plaintiffs alleged that Inche Mohamed paid other moneys to Raof although his debt of $10,000 had not been repaid, and also that he sold certain land to himself and the second defendant as trustees at an

undervalue, and they ask that the conveyance implementing such sale be set aside. They also asked for an account against the first defendant on the footing of wilful default.

It is clear that the plaintiffs can only be entitled to relief if they can show that they have some interest in Maimunah's estate.

There are two main defences; first that the land being customary land, a devise thereof was nugatory, and secondly that the land having been charged prior to the death of the testatrix and having been sold in pursuance of such charge, the devise failed.

As regards the first point, the learned trial Judge says in the course of his judgment, "It may be that under the law this was a mere nugatory devise. I do not think this is a point I have to decide in this action". With all respect to the learned Judge it appears to me that this issue calls for decision, since, if the devise was nugatory the plaintiffs never had any interest, and consequently cannot now be entitled to any relief.

Mr. Braddell for the respondents on the appeal replied on the evidence of F. M. Beins, a Deputy Collector of Land Revenue Malacca. He says that the land in question was customary land registered in the name of Raof, who applied in July 1919 for its conversion into a statutory land grant. In cross-examination he said: "The application was approved in September 1919. It thus lost its character as customary land". Mr. Braddell sought to fortify this evidence by stating that it was the practice in Malacca to treat land, the conversion of which had been approved, as being equivalent to land held under a statutory grant.

Mr. Cobbett, however, for the appellants, relied on the provisions of the Ordinance (Cap. 125). Section 10 of the Ordinance provided the procedure for converting land held under customary tenure. There must first be a report by the Resident Councillor, and then a provisional order may be made by the Governor in Council, and such provisional order must be registered in the Mukim Register, posted in a conspicous place on the land, and published in three successive issues of the Gazette. Any person claiming any right or interest may apply to the High Court by motion. If no one applies the Governor in Council shall confirm the provisional order, and the confirming order shall also be published in the Gazette. Then after the laps of another three months the Collector can issue a grant under the provisions of the Crown Lands Ordinance.

So far as the land in question is concerned, all that we know is that on the 22nd May, 1924, more than three years after Maimunah's death, a statutory grant was issued in favour of N.V.R. Somasundaram Chetty. The Court must presume that at some time or other the various provisions of S. 10 of the Ordinance were complied with, and the provisional order and the confirming order made and gazetted. But there is no presumption that these formalities were completed prior to Maimunah's death, and until they were completed, the land continued to be customary land. It is obviously incompetent for the Deputy Collector of Land Revenue to allege a custom, or for Mr. Braddell to allege a practice, which is inconsistent with the express provisions of the Ordinance. The land was customary land in 1919, and it was for the plaintiffs to establish that the land had ceased to be customary land by February 1921 when Maimunah died. This they have failed to do because they have not produced before the Court the best evidence available, namely the records of the Land Office or Mukim Register, and the publications in the Gazette. As such evidence was quite easily available, the documents being documents of public record, it can be presumed that such evidence, if produced, would have been unfavourable to the plaintiff's case.

In my opinion, the land therefore must be presumed to have still been customary land at Maimunah's death, and by virtue of S. 11, S.S. 1 of the Ordinance the land descended on Maimunah's death to her heirs according to Mohammadan law. As the Plaintiff's father was alive, they could by no possible means come under this category. Accordingly they had no interest under the will.

I do not, however, wish to decide this case merely because the plaintiffs did not adduce proper evidence that the land had ceased to be customary land. In my opinion the defendants are also entitled to succeed even if it is presumed in the plaintiffs' favour that the land was capable of being devised by will.

The plaintiffs alleged in their statement of claim that Inche Mohamed committed a breach of trust in selling a piece of land referred to in para. 5 of the will as being situated in Bona Vista Road to himself and the second defendant as trustees at a gross undervalue. No other breach of trust is alleged in the pleadings, although during the appeal Mr. Braddell laid stress on the fact that Inche Mohamed paid a debt of Raof's amounting to $5,625, while Raof's indebtedness in respect of the Klebang land was still unsatisfied. As regards the Bona Vista land, the

evidence of L.A. Chitty is to the effect that at the time of the sale the price of $1,105 was a fair price. It is probably correct that the sale could be set aside on the grounds mentioned in the judgment appealed from at the instance of a party interested, but this direction would be of little practical benefit to the estate, as admittedly the purchase price would have to be repaid and the estate would only be interested in the surplus, if any. As the argument proceeded on the basis that Raof had already been overpaid, he would not get the benefit of any accretion to the estate until Haji Ahmad, the other residuary legatee, had received payment of a sum equal to that received by Raof. And even supposing the unlikely event that after the shares of the residuary legatees had been equalised there was still a surplus divisible, I know of no principle of law under which the plaintiffs could claim immediate payment to them of the share payable to Raof without obtaining some order or direction in proceedings to which Raof was a party. The plaintiffs are only interested in a specific devise; they are strangers to the estate generally, and they cannot stand in Raof's shoes for the purpose of claiming any relief to which Raof may be entitled, but in respect of which they have at present no interest whatever.

As regards the alleged overpayment to Raof of $5,625 which, as I have said, is not referred to in the pleadings, it may have been open to Haji Ahmad to complain of this, but so far as the plaintiffs are concerned, any overpayments to Raof would have enured to their benefit as they would put him in a better position to repay the $10,000 charged on the Klebang land.

It is well established that if a specific bequest fails the legatee has no right of recoupment from the general estate. Even if Raof had wrongfully charged the land *after* Maimunah's death by taking advantage of the fact that the land was registered in his name, I cannot see that the executor would be liable for Raof's act which would have been beyond the executor's control, though no doubt an action would have lain against Raof. But the plaintiffs are in an even worse position in that the charge was made prior to Maimuah's death. The subject matter of the devise was therefore diminished by the amount of the charge, and it was only in effect an equity of redemption which passed to the plaintiffs. It is not suggested that the executor was under any duty to repay the $10,000 out of the general estate, and in the absence of any such duty the plaintiffs have no right of relief against the executor.

In my opinion, therefore, the plaintiffs never had any interest such as would entitle them to relief. The appeal will be allowed and the judgment in the Court below set aside and the action dismissed with costs. The appellants will be entitled to the costs of the appeal and the deposit should be repaid to them or their solicitors.

Poyser, C.J. (F.M.S.)—I concur.

Gordon-Smith, Ag. J.A.—I concur.

Appeal allowed.

Solicitors for appellants—*Zehnder Brothers.*

Solicitors for respondents—*Rogers & Son.*

[ORIGINAL CIVIL JURISDICTION]

PEDLOW, J.

August 29, 1940.

IN RE THE ESTATE OF MOHAMED SALLEH EUSOFF DECD.

AND

IN RE AN INDENTURE DATED THE 17th MAY 1915 ETC.

RAHIMABOO BINTE MOHAMED SALLEH ANGULLIA (f)

v.

MOHAMED AHMAD ANGULLIA & OTHERS.

[SINGAPORE ORIGINATING SUMMONS No. 5 of 1940]

Will—Mortgage of "all the share and interest" of a beneficiary—Construction—Beneficiary subsequently becoming entitled to a further share under a limitation to another's "heirs according to Mohammedan law" Spes successionis—Whether such interest passed under the mortgage—Mortgage executed by attorney—Construction of mortgage by reference to power of attorney —Effect of new referential document.

The testator M.S.E. Angullia died on the 21st September 1904 leaving a will and two codicils under which his two sons A. and E. and his daughter the plaintiff received certain shares. E's share was settled on certain trusts, the ultimate limitation, on failure of issue at E's death, being to "his heirs according to Mohammedan law." On the 31st January 1907, the plaintiff mortgaged to one Komarappa Chitty all her "share and interest in the estate and effects" of the testator, "and all other if any" her share and interest in the estates and effects of the testator "whether arising under the terms of his will or otherwise." The mortgage was executed by an attorney of the plaintiff.

At the date of the mortgage the plaintiff had her own share in the testator's estate and it was not disputed that this passed under the mortgage. E. died on the 7th June 1938 without issue, and thereupon his share in the testator's estate devolved upon his brother A, and his sister the plaintiff as his heirs according to Mohammedan law, in the proportion of 2 shares to 1 respectively.